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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1959.

No. 292

JOHN FRANCIS KEENAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

JAMES F. KEENAN,
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vs.

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MARK KEENAN,
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vs.

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REPLY BRIEF OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I.

The Government makes a succinct answer to the complaint of Petitioner, John Francis Keenan, that the Government failed to prove a net worth case against him, by

suggesting at page 14 of its Brief, "Petitioners pose the question (Pet. 2-3, 16, 21) in terms of whether the court below was justified in holding that the Government's 'good faith' excused alleged errors in the net worth figures. But the Court of Appeals made no such holding. Its reference to 'good faith' (Pet. 16) was in response to petitioner's argument below—abandoned here—that the introduction of net worth proof was unnecessary."

The Court of Appeals ignored entirely the argument and computations appearing in Mr. Keenan's Brief to show that there was not an accurate starting point as of December 31, 1949. Examination of the original Brief and Argument of Mr. Keenan, filed in the United States Court of Appeals for the Seventh Circuit (pp. 38-49), shows conclusively that the Government's starting point was inaccurate in that Government Exhibit 414 and the testimony of the agent who prepared it and testified with respect thereto, disclosed the absence of a loans payable item of $35,466.58. This also appeared on Government's Exhibit 348, prepared by Agent Forman. There is nothing in the record to show that this item was erroneous or that its appearance on Government's Exhibit 348 was based on untruthful books. This is not a truthful and honest variation between his books, as transcribed on Government's Exhibit 348, and the Government's reconstruction of his net worth, as shown on Government's Exhibit 414.

The variation exists because of the arbitrary and unjustified action by Agent Levin, who prepared Exhibit 414. This is shown by Mr. Levin's testimony. As pointed out on page 19 of the Petition, his explanation as to why he omitted these loans from his summary is that he "requested Mark Keenan, George Keenan and Edward Keenan to bring in verification of the amounts, and he never received the same, and he was not satisfied with the information these

defendants gave about the loans 'based on all of the evidence in the case'" (R. 2042-2043). Details of the loans payable account, as shown on the second page of Exhibit 348, from the year 1943 through 1951, are shown in a separate analysis attached to Exhibit 348, page AA. None of these items had anything to do with Mark Keenan, George Keenan and Edward Keenan, and needed no verification from them.

Another defect in the Government's "net worth" case is the omission therefrom of an asset belonging to Frank Keenan which was known to the Government. Reference to Government's Exhibit 348 indicates conclusively that Special Agent Forman included the cash surrender value of Frank Keenan's life insurance policies with the Travelers Life Insurance Company among his assets from the years 1943 through 1949; in 1943 it amounted to $14,561.65, and it increased yearly until it amounted to $28,223.60 in 1949. Here the Government *knew* of this asset, and Special Agent Levin did not include it in his "net worth" computation and summary.

Since there is a false and inaccurate starting point, the understatements of net worth of Mr. Keenan for the taxable years of 1950, 1951 and 1952 must fail, according to the formula prescribed by this Court in *Holland* v. *United States*, 348 U. S. 121, 132.

II.

In answering the Petitioners' contention that the deletion of overt acts 15 through 21 was an unauthorized and fatal amendment of Count II of the Indictment and deprived the Court of jurisdiction to try the Petitioners on said count, the Government cites 7(d) of the Federal Rules of Criminal Procedure, which provides that "The court on motion of the

defendant may strike surplusage from the indictment or information" and points out that the deletion was made at the request of the Petitioners.

The question to be determined, obviously, is whether the seven overt acts are surplusage. If they are not surplusage, then the conduct of the Court in deleting the same is subject to the impact of *Ex parte Bain*, 121 U. S. 1, 9, and the other cases cited at pages 22 and 23 of the Petition.

It follows further, under such circumstance, that the consent of the defense counsel to the deletion of the overt acts does not affect the situation. See cases cited at page 23 of Petitioners' Brief. This is particularly true if the deletion of the counts deprived the Court of jurisdiction over the subject matter described in Count 11 and of the right to try the defendants on that count. Jurisdiction of the subject matter cannot be conferred upon the Court by consent of the litigants; it only arises by a proper pleading.

III.

In arguing that the commissions paid to the brothers and sons of John Francis Keenan by the Champlin-Shealy Company were excessive, the Government overlooks that the total amount of sales of the corporation from 1945 through 1954, as set forth in John Francis Keenan's Petition (pages 56,57) totals *Three Million, six hundred nineteen thousand, five hundred fifty-nine dollars* and seventy-seven cents ($3,619,559.77).

The Government disallowed practically all of the compensation and expenses paid to John Francis Keenan's brothers and sons. It is apparent that the Government takes the position that none of these parties is entitled to any compensation merely because they delivered most of their compensation to Petitioner, John Francis Keenan.

The compensation of all of the brothers and sons was fixed in advance by the corporate resolution. All the payments appeared clearly on the books.

It was not necessary for any of the said parties to go out on the street to seek business. They could seek it through correspondence, over the telephone or in any other manner. If a customer was once obtained by one of the parties, that party was entitled to commissions as long as that customer remained with Champlin-Shealy Company, even if nothing more than good service stimulated the customer's continued business.

In the only case cited by the Government on the question of reasonableness of compensation paid by a percentage of the sales, *U. S.* v. *Ragen*, 314 U. S. 513, the defendants destroyed corporate books and back-dated employment contracts and corporate minutes "as if they were actual events contemporaneous with the false dates of recording."

In the instant case, the *entire* deduction is not fabricated. Every payment of compensation, and deduction therefor, appears on the books of Champlin-Shealy Company, in its income tax returns and in the respective returns of the brothers, and sons of Petitioner, John Francis Keenan.

The business of Champlin-Shealy Company was respectable and legitimate. Hundreds of cases of reasonableness, or lack of it, on salaries or other forms of compensation paid to employees are collected in the Prentice-Hall Federal Tax Service, 1954, Par. 11,702-C through Par. 11,703-J (Cases collected under Eight Categories); Commerce Clearing House Standard Federal Tax Reporter, 1954, Par. 161, 269 (Cases arranged by type of industry or business); Research Institute of America Federal Tax Coordinator, Pages 11,841 to 11,852 (Chart of numerous cases analyzed in tabular form). Numerous methods of paying compensation, in-

cluding the percentage basis, are collected in the work of Washington and Rothschild, "Compensating the Corporate Executive", Revised Edition. In all of these sources, counsel has been unable to find a single instance where a legitimate business man and a legitimate enterprise were charged with attempting to defeat and evade the income tax law by the payment of unreasonable salaries or compensation.

IV.

The reply to the Government's Brief on the question of the Statute of Limitations (pages 17-18), is amply answered by reference to pages 27-31 of Petitioners' Petition for Writ of Certiorari.

V.

The reply to the Government's Brief as to the sufficiency of the overt acts is amply answered by reference to pages 31-34 of Petitioners' Petition for Writ of Certiorari.

VI.

(a.) The Government defends the complaint of John Francis Keenan that reading the Illinois Statute which prohibits municipal officers from doing business with the City and punishes the same as a crime, was justified because there was evidence that the corporation was doing business with the City while John Francis Keenan was an alderman. To support that statement, the Government refers to R. 2348-2349, 2945-2946, 1845, 2571-72. Reference to these Record pages indicates that the Government's statement is highly inaccurate. Nothing appears at Record page 1845 to show that Champlin-Shealy Company obtained any business from the City of Chicago while John Francis Keenan

was an alderman, except for the memorandum of interview between Mark Keenan and Government Agents, in which (at page 1845) Mark Keenan stated to Government Agents that his duties consisted of responsibility for servicing City, County, Sanitary District accounts and accounts of a few lawyers. There is nothing in the evidence to show which city's account Mark Keenan was servicing.

Reference to Record pages 2348 and 2349 shows that James Keenan obtained business for Champlin-Shealy Company from the Municipal Court of Chicago, which is separate from the City of Chicago and was created by an Act entitled "An Act in relation to a municipal-court in the City of Chicago," approved May 18, 1908, Illinois Revised Statutes, Chapter 38, Sections 358 to 426. The Municipal Court is an autonomous entity, separate from, and independent of, the City of Chicago. This evidence was brought out *after* the close of the Government's case, when James Keenan took the stand in his own defense.

Examination of Record pages 2945-46 does not show that Champlin-Shealy Company did any business with the City of Chicago. Frank Keenan was on the stand and he was asked whether he heard Government's Exhibit 354 read to the jury. This was a statement of James Keenan to Agent Forman which was an atempt to impeach Frank Keenan by an unauthorized statement of his brother, a statement *made out of Frank Keenan's presence*. The question asked of Frank Keenan on cross-examination was: "Sir, did you hear James state—Government's Exhibit 354, he stated that the reason he held all of the Champlin-Shealy stock in his name was because his brother Frank, a city alderman at the time, had been advised by an attorney that State law forbade aldermen from doing business with the city."

This statement contains no proof that Champlin-Shealy did business with the City of Chicago while John Francis

Keenan was an alderman. Frank Keenan testified that the contents of James' statement was not a fact (R. 2947). Reference to Record pages 2571-72 does not indicate that any business whatsoever was done between Champlin-Shealy Company and the City of Chicago.

(b) The Government explains that the Prosecutor's question about James Keenan's sick wife was to show that James was staying home with her and was not traveling about the country on corporate business; that this question was pertinent with respect to whether certain payments to James were legitimate corporate expenses. That inquiry could have been made in proper, dignified and unprejudicial language and the Government's explanation constitutes no excuse for the type of question asked.

(c) It is difficult to understand how the prejudicial cross-examination of Frank Keenan about the correctness of his income tax returns as compared with the built-up tax liability computed by Government witness, Mr. Harlan, could have cast any information on the authenticity of the Government's starting point (December 31, 1949), for the purpose of proving a net worth case against Frank Keenan. Government's Exhibit 414, which was introduced for the purpose of setting forth the Government's summary of its evidence to prove a net worth case against Frank Keenan, did not go back to the years 1930 to 1940. Government's Exhibit 414 began with December 31, 1948. The objectionable questions were asked with respect to the taxable years 1937, 1941 and 1943. See page 37 of Petition.

VII.

The portion of the Government's Brief (pages 20-21) with respect to the prejudicial effect of the avalanche of evidence introduced, particularly in connection with the non-proved net worth case of Government, is amply answered at pages 7 to 48 of the Petition.

Respectfully submitted,

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PETITION FOR REHEARING.

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PETITION FOR REHEARING.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, John Francis Keenan, James E. Keenan and Mark Keenan, respectfully petition this Court to grant a rehearing of this cause, this Honorable Court having denied the Petitioners' Petition for a Writ of Certiorari on October 19, 1959.

Petitioners show unto this Court that on November 2, 1959, on motion of the Petitioners, the United States Court of Appeals for the Seventh Circuit ordered that the issuance of its mandates be withheld pending the disposition of a Petition by the Petitioners to the Supreme Court of the United States for a rehearing of the aforesaid order of this Court denying the Petition for a Writ of Certiorari.

The Petitioners file this Petition for Rehearing within the provisions of Rule 58 of the Rules of the Supreme Court of the United States. This Petition is filed within twenty-five days after the decision of this Court denying the Petition for a Writ of Certiorari (October 19, 1959). The Petitioners present to this Court other substantial grounds which were available to Petitioners but not previously presented (e. g. *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50).

I.

In his opening statement, Mr. Howard B. Gliedman, the Special Assistant to the Attorney General, told the jury the following (R. 332-333):

> "Now you may wonder why these years, 1950, '51 and '52, were picked for indictment and we refer to other years. Well, those years prior to 1950 are barred because of the Statute of Limitations; except for the conspiracy. Years subsequent to 1952 the Government has not audited and that will be shown to you on the stand. They are not to be considered by you, but just on the count of conspiracy, as to certain acts which we will show you after 1951, 1950 and 1952. That is the reason we have those three years, although the evidence is going to show you lots of other years. The ones before that were barred by the Statute; the ones after that that were not ready at the time of the action."

This statement was highly prejudicial in that it contains clear intimation to the jury that the defendants had com-

mitted crimes in violation of the Internal Revenue Code prior to 1950 and subsequent to 1952. The statement to the jury, "That is the reason we have these three years, *although the evidence is going to show you lots of other years*," indicates a deliberate and calculated intention to introduce the prejudicial cross examination of Frank Keenan with respect to his income tax for the years 1934, 1937, 1939, 1942 and 1943 (R. 2977-2982). For the sake of brevity, Petitioners' counsel calls this Court's attention to the argument on pages 36 to 38 of the Petition for Certiorari.

II.

At pages 21 to 23 of the Petition for Certiorari, the Petitioners argued that the withdrawal by the Government of Overt Acts 15 through 21 and the deletion of the said overt acts from Count 11 of the Indictment constituted a fatal amendment thereof and deprived the Court of jurisdiction to try all of the Petitioners on said Count 11.

The modified Indictment was given to the jury so that they would not have an opportunity to know that there were these overt acts, 15 through 21. The Court, in modifying Count 11 and delivering the said modified count to the jury during their deliberations, overlooked the fact that he had read the *entire* Indictment to the jury on the day the trial commenced. This is so indicated in the opening statement of the Prosecuting Attorney, Mr. Gliedman, where he stated to the jury (R. 333):

> "We are going to show you each and every item that his Honor read to you yesterday when he read you the *entire* indictment in this case. We are going to show you that those allegations in that indictment are *completely accurate* in the Government's case, and then we are going to ask you to bring in the proper verdict in this case."

At the close of the Government's case motions were made by Petitioners' counsel to strike overt acts 15 through 21 because they occurred after the conspiracy had ended. After arguments on the motion for judgments of acquittal the Government's attorney withdrew the said overt acts. Immediately prior to the withdrawal of these overt acts, and after arguments with respect thereto, the court stated (R. 2081): "I will say two things on that right now. They will be taken to the jury, and the jury instructed that they will not consider them as overt acts—I have forgotten the numbers of them."

No instruction, however, was given to the jury with respect to the withdrawn overt acts 15 through 21. In describing count 11 to the jury, during his instructions, the court stated (R. 3446): "In furtherance of, in the execution of and for the purpose of carrying into effect the object, designs and purposes of said conspiracy, the co-conspirators did do and perform overt acts. I shall not read to you the overt acts *but you may read them as set forth in count 11 of the indictment.*" (Italics ours.)

Inasmuch as the jury had heard the said overt acts read to them at the opening of the case, an instruction should have been given to them that they were not to consider in any manner the said overt acts which were read to them. It certainly must have been confusing to the jury, since the respective statements of certain defendants which were described in the said overt acts were actually read to the jury during the presentation of the Government's case.

III.

The Petitioners have pointed out in their Petition for Certiorari numerous specific instances of prejudicial evidence introduced by the Government, over objection, and of

prejudicial conduct, examination of witnesses and statements by the Prosecuting Attorney. These are in addition to the foregoing prejudicial matters presented herein. The cumulative effect of so many errors cannot be considered harmless and should be considered as having influenced the verdict of the jury and to have deprived the petitioners of due process of law. See *Kotteakos* v. *United States*, 328 U. S. 750, 763-765, 66 S. Ct. 1239, 90 L. Ed. 1557; *Bihn* v. *United States*, 328 U. S. 633, 637, 66 S. Ct. 1172, 90 L. Ed. 1485; *Bollenbach* v. *United States*, 326 U. S. 607, 614, 66 S. Ct. 402, 90 L. Ed. 350.

Upon reconsideration, counsel trusts that your Honors will grant certiorari upon this Petition for Rehearing.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

MYER H. GLADSTONE, counsel for petitioners, hereby certifies that this petition for rehearing is presented in good faith and not for delay. This petition is restricted to grounds specified in Rule 58 of the Rules of the Supreme Court of the United States.

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